NO. 961291 FEB 4 1997

In the Supreme Court of the United States

OCTOBER TERM, 1997

DOLORES M. OUBRE
PETITIONER

VERSUS

ENTERGY OPERATIONS, INC.
RESPONDENT

CIVIL APPEAL TO THE
UNITED STATES COURT OF APPEALS FOR
THE FIFTH CIRCUIT

PETITION FOR WRIT OF CERTIORARI

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QUESTIONS PRESENTED

I. Whether the petitioner, pursuant to Older Workers Benefit Protection Act amending the Age Discrimination in Employment Act in 1990, knowingly and voluntarily waived her rights to pursue a cause of action against her employer by executing release upon separation of employment.

II. Whether the petitioner received "consideration" to which she was not already entitled pursuant to the terms of her separation of employment thus, barring a challenge to executed waiver of rights.

III. Whether the petitioner ratified an otherwise invalid release by retaining compensation paid and/or failing to tender back said sums received pursuant to the terms of her separation of employment, thus making the release binding.

LIST OF PARTIES

A) Dolores M. Oubre, petitioner is a person of the full age of majority and resident of the State of Louisiana.

B) Entergy Operations, Inc., a corporation with its principal place of business in the Parish of Orleans and duly authorized to do and doing business in Louisiana.

Petitioner, Dolores M. Oubre, seeks to recover damages from respondent, Entergy Operations, Inc., as a result of unlawful separation from employment based upon her age in January, 1995. Petitioner submits that she did not knowingly and voluntarily execute release of claims at the time of her separation of employment, that she did not receive consideration for said waiver of rights and that the release of claim she executed at the time of her separation did not comply with the requirements of the Older Workers Benefit Protection Act and thus, is void.

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OPINIONS BELOW

The opinion of the Fifth Circuit Court of Appeals rendered November 6, 1996 is unreported. The opinion of the trial court rendered May 28, 1996 is unreported.

JURISDICTION

The Judgment of the Fifth Circuit Court of Appeals was entered on November 6, 1996. This Petition for Writ of Certiorari is sought within 90 days of the Judgment and this timely pursuant to 28 U.S.C. § 1257 and 2101(c) and Rule 10(1)(c) of the Rules of Court for the U.S. Supreme Court.

STATUTES

AGE DISCRIMINATION IN EMPLOYMENT ACT

SECTION 201. WAIVER OF RIGHTS OR CLAIMS

Section 7 of the Age Discrimination in Employment Act of 1967 (29 U.S.C. 626) is amended by adding at the end the following new subsection:

"(f)(1) An individual may not waive any right of claim under this Act unless the waiver is knowing and voluntary. Except as provided in paragraph (2), a waiver may not be considered knowing and voluntary unless at a minimum--

"(A) the waiver is part of an agreement between the individual and the employer that is written in a manner calculated to be understood by such individual, or by the average individual elegible to participate;

"(B) the waiver specifically refers to rights or claims arising under this Act;

"(C) the individual does not waive rights or cliams that may arise after the date the waiver is executed;

"(D) the individual waives rights or claims only in exchange for consideration in addition to anything of value to which the individual already is entitled;

"(E) the individual is advised in writing to consult with an attorney prior to executing the agreement;

"(F) (i) the individual is given a period of at least 21 days within which to consider the agreement; or

(ii) if a waiver is requested in connection with an exit incentive or other employment termination program offered to a group or class of employees, the individual is given a period of at least 45 days within which to consider the agreement;

"(G) the agreement provides that for a period of at least 7 days following the execution of such agreement, the individual may revoke the agreement, and the agreement shall not become effective or enforceable until the revocation period had expired;

"(H) if a waiver is requested in connection with an exit incentive or other employment termination program offered to a group or class or employees, the employer (at the commencement of the period specified in subparagraph (F) informs the individual in writing in a manner calculated to be understood by the average individual eligible to participate, as to

(i) any class, unit, or group of individuals covered by such program, any eligibility factors for such program, and any time limits applicable to such program; and

(ii) the job titles and ages of all individuals eligible or selected for the program, and the ages of all individuals in the same job classification or organizational unit who are not eligible or selected for the program.

"(G) A waiver in settlement of a charge filed with the Equal Employment Opportunity Commission, or an action filed in court by the individual's representative, alleging age discrimination of a kind prohibited under section 4 or 15 may not be considered knowing and voluntary unless at a minimum–

"(A) subparagraphs (A) through (E) of paragraph (1) have been met; and

"(B) the individual is given a reasonable period of time within which to consider the settlement agreement.

"(3) In any dispute that may arise over whether any of the requirements, conditions, and circumstances set forth in subparagraph (A), (B), (C), (D), (E), (F), (G) or (H) of paragraph (1), or subparagraph (A) or (B) of paragraph (2), have been met, the party asserting the validity of a waiver shall have the burden of proving in a court of competent jurisdiction that a waiver was knowing and voluntary pursuant to paragraph (1) or (2).

"(4) No waiver agreement may effect the Commission's rights and responsibilities to enforce this Act. No waiver may be used to justify interfering with the protected right of an employee to file a charge or participate in an investigation or proceeding conducted by the Commission."

Louisiana Civil Code Article 1966 - NO OBLIGATIONS WITHOUT CAUSE

An obligation cannot exist without a lawful cause.

Acts 1984, No. 331, § 1, eff. Jan. 1, 1985.

SUPREME COURT OF THE UNITED STATES

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DOLORES M. OUBRE
PETITIONER

VERSUS

ENTERGY OPERATIONS, INC.
RESPONDENT

CIVIL APPEAL FROM THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

Petitioner, Dolores M. Oubre, respectfully prays that a Writ of Certiorari be granted to review the decision of the United States District Court for the Eastern District of Louisiana granting Motion for Summary Judgment in favor of the respondent and the affirmation of same by the United States Court of Appeals for the Fifth Circuit entered in the above-entitled proceeding on November 6, 1996.

STATEMENT OF THE CASE

Petitioner contends that material facts of the case are in dispute and the following is a summarization of the facts as presented to the lower court and the Fifth Circuit Court of Appeals in consideration of Motion for Summary Judgment.

On September 26, 1995, petitioner, Dolores Oubre, a former employee of Entergy Operations, Inc. (EOI) and an individual over the age of 40 at the time of her separation of employment, filed suit in United States District Court, Eastern District for the State of Louisiana. The complaint was brought pursuant to Title 29 U.S.C. § 621, et seq, the Age Discrimination in Employment Act of 1967 (ADEA"), as amended in 1978, 1990, and 1991, and Louisiana Revised Statute Article 23:972 and 51:2231 et seq. The claimant has alleged that she was constructively discharged from her job because of her age.

Dolores Oubre, a single female was employed as an assistant scheduler in the Planning and Scheduling Department at Waterford Steam Electric Generating Station ("Waterford III") in 1994. Oubre had been employed at Waterford as an EOI employee for approximately seven years.

In the fall of 1994, EOI implemented a new employee evaluation process called the Management Planning and Review Ranking Process (The "Ranking Process"). The Ranking Process was allegedly developed to evaluate management and professional (salaried) employees at EOI by ranking them by two criteria, "performance" and "potential", as compared to their peers and transferring those rankings to a matrix that placed employees in one of 9 groups.

It was mandated that 10% of the targeted population ranked in category 9 or the lowest ranked group. People receiving two consecutive annual ratings in group 9 (fall 1994 and fall 1995) were to be terminted from EOI. Termination, however, could occur anytime for employee ranked 9 within

the 12-month period proceeding the next annual evaluation. Severance was not to be paid to individuals terminated from group 9. Those ranked in group 9 were to be given individual action plans with the understanding that even if the individual met all goals there was no guarantee that the individual would move out of group 9 and thus, would be subject to termination without benefits.

Pursuant to the ranking process, Oubre was ranked against all other salaried, non-managerial employees in the Planning and Scheduling Department. She ultimately fell into the group 9 category, although she had been awarded the highest evaluation level compared to her peers for the preceding two years. In 1993, Oubre was the only assistant scheduler deemed a valuable contributor while the two remaining assistant schedulers received lower ratings. In 1992, Oubre received a promotion from computer operator I to computer operator II, an indication that she was promotable, which was a criteria for evaluation under the "potential" prong of the two pronged 1994 rating process. Further, the plaintiff had completed *all* of her goals established by her immediate supervisor for 1994, a criteria to be used when evaluating an employee's annual performance, the second prong of the 1994 rating process. Thus, Oubre had no forewarning that she would fall within the 9 ranking and be faced with termination.

On January 17, 1995, Oubre was notified of her 9 ranking and the consequences thereof, i.e., that if she were ranked a 9 in next year's evaluation she would be terminated, that an action plan would be developed for her (though one was not available for her review) and if she did not continue to meet the goals and objectives of the action plan, she would be terminated at anytime and even if she met all the goals,

it would be very difficult to move out of the 9 ranking. Once informed of the precarious and vulnerable status in which she found herself as an employee ranked 9, Oubre was then presented with a severance package that included a general release.

The petitioner was given only two weeks to contemplate and to comprehend the abrupt change in her employment statuts based upon an evaluation that was inconsistent with her previous performance evaluation history; determine the availability of her employment opportunities which would afford her enough income to meet her monthly financial obligtions; to assess her employability based upon having been determined one of the lowest rated employees; and to evaluate the risk in selecting the action plan, which had not yet been drafted and which would subject her to potential termintion within one to two months without any benefits - or accept the severance package. On January 31, 1995, after a second meeting with her immediate supervisor, Jim Rooney, to clarify that it would be virtually impossible for her to move out of a 9 ranking, Oubre accepted the severance package, signed the release and was paid by EOI in accordance with the payment outlined in the severance package.

Given the circumstances surrounding the offer of the severance package, i.e., unexpected placement into the lowest ranked group of employees at Waterford in contrast to her previous outstanding work performance and promote-ability potential, the insufficient time within which to review the two options presented and the threat of termination if she opted to remain at EOI, the petitioner felt compelled to accept the severance and in return executed the waiver of rights.

Following limited discovery Entergy Operations, Inc., filed a Motion for Summary Judgment on May 2, 1996. Respondent argued that the claimant knowingly and voluntarily waived her rights to bring civil suit because she signed a release at the time of her separation of employment and ratified the invalid release by failing to return the benefits she received pursuant to the terms of her separation of employment.

The lower court entered Judgment in favor of the defendant's Motion for Summary Judgment on May 23, 1996. The Court ruled that it was not at liberty to disregard the jurisprudence of the Fifth Circuit Court of Appeals which portends that an invalid release pursuant to the OWBPA is merely voidable and not void and that the claimant who retains funds received upon separation of employment and does not tender back said sums acts to ratify the voidable release making it binding.

Notice of Appeal from final judgment rendered on May 23, 1996 was timely filed by the claimant on June 19, 1996. Judgment was rendered by the Fifth Circuit of Appeals on November 6, 1996 affirming, without reason, the lower court ruling which granted respondent's Motion for Summary judgment. Petitioner now seeks review of the lower courts' decisions in this Court by writ of certiorari.

REASONS FOR GRANTING WRIT OF CERTIORARI

MAY IT PLEASE THE COURT:

I. Introduction

Petitioner submits the following in support of her writ of certiorari to review the decision of the Fifth Circuit Court of Appeals rendered on November 6, 1996 affirming the District Court, Eastern District of the State of Louisiana, granting respondent's Motion for Summary Judgment. In granting summary judgment the lower court departed from the accepted standard of review regarding issues of material fact and said departure was sanctioned by the Fifth Circuit Court of Appeals. Further, because the Fifth Circuit Court of Appeals' decision is in conflict with the decisions of Seventh and Eleventh Circuit Court of Appeals on the same relevant matter-whether an invalid release under the Older Workers' Benefit Protection Act is void as opposed to voidable and whether a tender back of consideration is a prerequisite to bring suit in an action alleging violation of the Age Discrimination in Employment Act, the petition for writ of certiorari should be granted.

II. Standard for Review on Summary Judgment

In reviewing summary judgment, the court must view the evidence presented in light most favorable to the party opposing the motion. *Rhodes v. Guiberson*, 75 F. 3d 959 (5th Cir. 1996). The test utilized by the Fifth Circuit for review of summary judgment is *sufficiency of the evidence* under the *Boeing Co. v. Shipman*, 411 F.2d 345 (5th Cir. 1969) (en banc) standard. Under *Boeing*, there must be a conflict in substantive evidence to create a jury question. *Id.* at 375. In the present case, a jury question is present because the petitioner presented evidence, when taken as a whole, created a fact issue as to whether she knowingly and voluntarily executed the waiver and release offer by EOI upon separation from

employment.

III. Legislative Intent in Enacting § 626 (f) (1)

Congress has long recognized that when an employer asks an older worker to give up rights under the Age Discrimination Employment Act, protection must be in place to insure that the older worker does so freely, with his full knowledge of his rights under federal law. Until 1987, this protection was in the form of federal government or court supervision of waiver of rights. In 1987, the Equal Employment Opportunity Commission issued regulations permitting older workers to waive their rights without supervision. Congress, recognizing that these regulations could lead to potential employer abuse of waivers, suspended the regulations for two years and amended the ADEA by adding specific requirements which govern waiver of rights or claims. This growing concern about what standards should govern releases and how best to insure the protection of the older worker served as the nucleus of the Older Workers' Benefit Protection Act (OWBPA) enacted in 1990.

The OWBPA amended § 626 of the Age Discrimination in Employment Act (ADEA) by adding subsection (f) which requires that an individual may not waive "any right or claim under [the ADEA] unless the waiver is knowing and voluntary". 29 U.S.C. § 626 (f) (A)-(H). Pursuant to the new law, the establishment of the validity of the waiver under the statutory threshold requirements was the first inquiry regarding a challenged release. 136 Cong. Rec. S13, 597 (daily ed Sept. 24, 1990)

In addressing the standard of inquiry to be used in subsequently determining whether a waiver was made knowingly and voluntarily, the Senate managers of the bill passed by the Senate and House, and later signed into law as the OWBPA, purported to leave intact pre-OWBPA case law insofar as those decisions concerning the substantive determination of whether, in a given situation, a waiver has been executed knowingly and voluntarily. The Senate Committee specifically expressed support for the *totality of the circumstances* analysis utilized in *Civillo v. Arco Chemical Company*, 862 F.2d 448 (3rd Cir. 1988), and it disapproved, as did the House Committeee, the approach used in *Lancaster v. Buerkle Buick Honda Company*, 808 F.2d 539 (8th Cir.), *cert denied* 482 U.S. 928 (1987) which entailed the application of ordinary contract doctrine. *Senate Committee Labor & Human Resources*, the Older Workers Benefit Protection Act, S.Rep. No. 236, 101 St. Cong., 2d Sess 32 (1990) Relevant factors to be considered under the totality of the circumstances approach includes the preciseness of the release language; the amount of time the claimant had for deliberation; whether the claimant was aware of her rights and was encouraged to seek advise of counsel; opportunity for negotiation; and whether the claimant received consideration for which she was not already entitled. *Civillo*, 862 F.2d at 451. These same factors were incorporated into § 7(f) of the OWBPA.

IV. Validity of Release Pursuant to Minimum Statutory Requirements.

In order for a waiver by an individual to be "knowing and voluntary", § 626(f)(1) requires, *at a minimum*, that the following criteria are met:

1) the waiver must be part of an agreement that "is written in a manner calculated to be understood by [the] individual or by the average individual eligible to participate";

2) *it must specificaly refer to rights or claims arising under the ADEA;*

3) the individual does not waive "rights or claims that may arise after the date the vaiver is executed";

4) *the individual does not waive rights or claims in exchange for consideration "to which the individual is already entitled";*

5) the individual "is advised in writing to consult with an attorney before executing the agreement";

6) *the individual is given 21 days to consider the agreement or — if the waiver is requested in connection with an exit incentive or an "employment termination program" offered to a group of employees — 45 days to consider the agreement;*

7) *the agreement must give the individual a period of seven days to revoke the agreement, and provide that the waiver is not effective or enforceable until after expiration of the revocation period;* and

8) *where a waiver is requested in conjunction with an exit incentive or employment termination program, the employer must inform the in-*

> *dividual at the start of the 45-day consideration period of the class of individuals covered by the program along with any eligibility factors for the program and any time limits involved, as well as the job titled and ages of individuals covered or selected by the program and the same information for individuals "in the same job classification or organizational unit" who are not eligible or selected for the program. Id.* (emphasis added)

The proposition that if a release is not entered into knowingly and voluntarily it will not be enforceable against the employee who signed it is at the heart of § 7(f) of the OWBPA. The OWBPA sets forth minimum requirements to be met for a waiver to be considered knowing and voluntary. The Act creates a floor not a ceiling. *Soliman v. Digital Equipment Corporation*, 869 F.Supp. 65, 69 Fn13 (D.Mass. 1994)

In the present case, a review of the release drafted by Entergy Operations, Inc. (EOI) and executed by the claimant woefully lacks a majority of the "minimum" requirements outlined by the act. The release reads as follows:

> "I, _____, knowingly, voluntarily; and for valuable consideration agree to waive, settle, release, and discharge any and all claims, demands, damages, actions or causes of action occurring on or before the date of the execution of this Release, whether known of hereafter discovered, that I may have against Entergy Operations, Inc., its parent corporation,... ("the Company"), which in any way relate to my employment by or my separation from the company.
>
> I acknowledge that I was provided with a copy of this release, that I was advised to discuss

> this release with my lawyer, and that I was given no less than 14 days within which to consider signing this Release. I have thoroughly reviewed this Release and understand that, to the extent I have any claim covered by the Release, I am waiving potentially valuable rights by signing below. My execution of this release is free and voluntary and was not produced through duress, coercion or undue influence.
>
> I UNDERSTAND, ACKNOWLEDGE, AND AGREE THAT BY SIGNING THIS RELEASE, I AM OBTAINING ADDITIONAL MONIES AND BENEFITS FROM THE COMPANY IN THE FORM OF A VOLUNTARY SEVERANCE PACKAGE TO WHICH I WOULD NOT BE OTHERWISE ENTITLED. I UNDERSTAND, ACKNOWLEDGE, AND AGREE TO ALL THE TERMS OF THIS AGREEMENT."

The release does not specifically refer to claims airing under the ADEA; the release does not provide for the requisite 21 day (or questionably 45 days) to consider the agreement; the release does not provide for a seven day revocation period following execution; and the release does not provide specific information with regard to individuals in the same job classification not eligible for the program.

It is clear that characterization of the "program" which the claimant was offered is in question with regard to individual or group termination. Individual separation agreements are the result of adverse actions taken against an individual employee. The employee understands that action is being taken against him, and he may engage in negotiations to resolve any differences with his employer.

Group termination and reduction programs are drastically different from individual separation. *See, Burch v. Fluor Corp.,* 867 F. Supp 873 (E.D. Mo 1994).

While the respondents content that the severance package was a voluntary offering and the 1994 ranking process was not promoted as a reduction in force plan, its effect-that a mandated 10% of targeted employees were to be ranked 9, that they were to be eventually terminated if they chose to remain employed at EOI, and, at least in the petitioner's case, the position she vacated was not filled-was to reduce the number of workers employed at Waterford. Further, a standardized formula or package of benefits was presented to each rank 9 employee and the terms presented were not negotiable, a trademark of group termination programs.

Although most group programs are not based on individual characteristics, the manner in which the employees were ranked 9 and the objective of the ranking and subsequent termination program - a 10% reduction in work force - calls into question whether the Petitioner was subject to an individual termination or group termination. *See, Oberg v. Allied Van Lines, Inc.,* 11 F.3d 679 (7th Cir. 1993) (Wherein the court ruled that termination of sixty plus employees terminated at one time satisfied OWBPA's definition of a group termination.) Regardless, the release prepared by EOI did not provided the minimal requisite amount of time for the employee to contemplate the offer.

The thrust of the legislative review of the OWBPA before its passage regarding the necessity of safeguards in addressing waivers in which an older worker knowingly and willingly abandons his rights rested upon the premiss that employers should not pressure individuals into signing a

waiver of legal rights, either by lack of time to adequately consider the terms and conditions of the offer, or through an insufficient explanation of the offer or the circumstances leading to the offer. *See Joint Hearing before the Select Committee on Aging and the Subcommittee on Employment Opportunities of the Committee on Education and Labor,* House of Representatives, One Hundred First Congress, April 18, 1989. The provisions enumerated in the act, when included in a waiver, provide the employee with the necessary time and knowledge to make an informed decision regarding the offer extended by the employer. The lack of the minimun requirements raises the presumption that the employee did not have sufficient time or information to knowingly waive his rights. *Oberg v. Allied Van Lines, Inc.,* 11 F.3d 679 (7th Cir. 1993); *E.E.D.C. v. Sara Lee Corp.* 923 F.Supp 994 (W.D. Mich 1995); *Solimen v. Digital Equipment Corp.,* 869 F.Supp 65 (D. Mass; 1994); *Carr v. Armstrong Air Conditioning, Inc.,* 817 F.Supp. 54 (N.D. Ohio 1993).

Pursuant to the provisions of the Act, the release drafted by EOI does not meet statutory requirements of a valid release on numerous counts and thus is void. Without inclusion of the minimum rquirements a material issue of fact is raised as to whether Oubre did not "knowingly and voluntarily" waive her rights to pursue a claim against EOI.

V. Validity of Release - Duress

The OWBPA, in providing statutory guidelines in favor of employees, clearly stands for the edict that employers should not be permitted to exploit their superior bargaining positions and the vulnerable conditions of their older workers by forcing them to sign away their rights. The extent of pressure placed upon the claimant should be considered when determining whether a claimant has voluntarily and will-

ingly signed a release. *Coventry v. United States Steel Corp.*, 856 F.2d 514 (3rd Cir. 1988). In *Coventry,* the Court ruled that the employer placed unfair economic pressure on the claimant to sign a release when faced with the option of having all of his income and benefits ceased immediately. *Id.* at 524. As stated by Chairman Edward R. Roybal in addressing the necessity of the OWBPA:

> "...An older worker, faced with the likely prospect of termination, and knowing the difficulties of finding another job at an older age is in a desperate situation. He often has not alternative but to take whatever benefits the employer is willing to offer him, even if it means giving up fundamental employment rights. Furthermore it is highly unlikely that, at this point the older worker even knows what fundamental rights he is entitled to.
>
> I believe that this is totally unacceptable. Employers should not be permitted to exploit their superior bargaining position, and the vulnerable condition of older employees, by forcing them to sign away their rights. By allowing this to continue, we are simply encouraging employers to engage in discriminatory employment practices." *Joint Hearing before the Select Committee on Aging and the Subcommittee on Employment Opportunities of the Committee on Education and Labor,* House of Representatives One Hundred First Congress, April 18, 1989.

Given the circumstances of the case at bar: the incredulous placement of the claimant into the lowest ranked group of employees at Waterford in contrast to her outstanding work performance and promotability; the insufficient time within which to contemplate the two options presented

in contrast to the enormous amount of time expended by the company in devising a plan to reduce its work force by 10% and prepare severance packages; and the threat of immediate termination if the claimant opted to remain at Entergy Operations, Inc., the claimant did not believe she had a choice with regard to accepting the severance.

An older worker, such as the petitioner, faced with the likely prospect of termination and knowing the difficulties of finding another job at an older age, is in a desperate situation. She had no alternative but to take whatever benefits the employer is willing to offer her, even if it means giving up fundamental employment rights. The provisions of OWBPA was enacted to create a "level playing field" between employer and employee. When allowed to ignore these requirements, the employer is placed in a favored position to exercise its superior bargaining power to the disadvantage of the employee. The evidence is overwhelming that Entergy Operations, Inc. used its superior bargaining position to place unfair economic pressure on the claimant to sign the release. Thus, here is a material issue of fact as to whether the claimant willingly and voluntarily signed the invalid release.

VI. Consideration Requirement of the Act

Codified in the OWBPA at § 7 (f) (1) (D) is the common law doctrine that a waiver may not be considered knowing or voluntary unless the individual waives rights or claims in exchange for consideration in addition to anything of value to which the individual is entitled. Further, it is fundamental in Louisiana Law that for a contract to be valid there must

be cause or consideration. LSA-C.C. Art. 1966. The key factor is determining the validity of a release is not the amount of consideration the person given the release receives but rather whether the person received something to which he was not previously entitled. *Schott-Norton Ford, Inc. v. Ford Motor Company,* 524 F.Supp. 1099 (D. Minn. 1981), *affirmed without opinion,* 685 F.2d 438 (8th Cir. 1982).

By signing a release and waiver of claims, Oubre received one month administrative leave and one week of salary for each year of accredited service. The money was not paid in one sum but over a period of time as if the claimant were on payroll. Employees who had been previously involuntarily terminated received the same consideration but were not required to execute a release and/or waiver of rights. In late 1995, a voluntary severance package was offered to select employees including some previously ranked nine which provided for two months administrative leave and two weeks of salary for each year of accredited service in exchange for a release of claims.

Thus, Oubre did not receive any *additional* consideration in exchange for a release, whether considered voluntary or involuntary, waiving all rights to pursue claims against EOI. The employees involuntarily laid off in 1994 received like compensation but were not required to sign a release. The employees who were approached with voluntary severance for a release were offered twice the amount of consideration offered the claimant as an inducement to voluntarily end their employment relationship with EOI. While it is a question of fact whether the claimant was voluntary or involuntarily separated from her employment at EOI, she did not receive like compensation as compared to other employees. *But see, O'Hara v. Global Natural Resources, Inc.,* 898 F.2d 1015 (5th Cir. 1990). The Fifth Circuit Court of

Appeals, in rejecting O'Hara's claim that the release was unsupported by consideration, ruled that the claimant gave up a disputed right to benefits she would have received had she been discharged without cause for an undisputed right to a smaller package of benefits.

In the present case, the claimant did not receive any consideration for execution of release in addition to which she was already entitled pursuant to EOI's prior and subsequent handling of all other employees who were offered severance packages upon separation from the company. The District Court did not make a determination on this issue, nor did the Fifth Circuit Court of Appeals. There remains a material question of fact as to whether the claimant received consideration for execution of the release and whether the lack thereof would render the release void. This matter is not ripe for final disposition and the lower court deviated from the accepted standard of review in granting summary judgment.

VII. Failure to tender back severance funds does not ratify an otherwise invalid OWBPA release.

In support of summary judgment, EOI relied upon a recent line of cases arising from the Fifth Circuit Court of Appeals which examined the criteria set forth in the Older Workers Benefit Protection Act ("OWBPA"), 1990 amendment to the ADEA; the necessity for strict compliance with the OWBPA; and an individual's ratification of a release which is not in strict compliance with the OWBPA. Pursuant to this jurisprudence, in signing the release; in accepting the consideration; and in failing to tender back the consideration, the petitioner has ratified the defective release and thus is held to its terms in waiving all rights to pursue any claims against Entergy Operations, Inc. *Blakeney v.*

Lomas Information Systems, Inc., 65 F.3d 482 (5th Cir. 1995); *Wiffort v. Shell Oil Company*, 37 F.3d 1151 (5th Cir. 1994); and *Wamsley v. Champion Refining and Chemicals, Inc.*, 11 F.3d 342 (5th Cir. 1994). The petitioner contends that the defendant's reliance upon the Fifth Circuit's rational in applying strict contract doctrine is in error.

Pursuant to *Wamsley* and its prodigy, the defective waiver in the case subjudice is merely voidable and not void. *Id.* at 539. Failure on behalf of the petitioner to tender back the consideration for the promise not to sue, manifests an intention to be bound by the terms of the waiver. *Id.* at 540. In *Wamsley*, the Fifth Circuit explored in detail the doctrine of contractual ratification and the congressional intent in enacting OWBPA to arrive at the conclusion that a waiver which is not in compliance with the requirements delineated in OWBPA is voidable and not void. *Id.* at 538-39.

The petitioner contends, however, that the Fifth Circuit Court of Appeals' rational is erroneous. A careful review of *Wittford* reveals that the claimant was offered an "enhanced" severance package in exchange for execution of a waiver of rights. If the waiver was not executed the claimant would have received severance pay at a lesser value. Thus, the consideration provision of the OWBPA was met and pursuant to the Fifth Circuit's interpretation retention of the consideration led to a ratification of the invalid release. In *Blakeney* the employer complied with the provisions if the OWBPA. Instead of erroneously relying on ratification doctrine, the Fifth Circuit should have reached the same correct ruling by upholding the presumption that the claimant knowingly executed the waiver because of the company's compliance with the law.

In the present case the petitioner was not given adequate time to consider the offer, adequate information regarding the basis of the offer, nor consideration for execution of the release. As previously argued, Oubre was not offered any additional compensation to which she was not already entitled. Thus, she could not tender back consideration which she never received to void the waiver. There has been no determination by the lower court or the Fifth Circuit that the money received by Oubre was indeed valid consideration in exchange for her waiver of rights. Thus, based upon the lack of considertion contract doctrine urged by the Fifth Circuit does not apply and the waiver is void. Further, as previously argued, the release drafted by EOI did not meet the minimum requirements of the act, therefore a presumption is created in the present case that the petitioner did not knowingly waiver her rights.

It is clear from the mere fact that the ADEA, established in 1967 to protect employees at least 40 years of age from discriminatory employment practices based on age, was amended by the OWBPA in 1990, that Congress intended to afford older workers with additional rights when releases are utilized by employers. Pursuant to the Congressional history previously presented, it is clear that the legislative intent regarding interpretation of the OWBPA and the implementation thereof was to be reviewed upon the totality of the circumstances on a case by case basis and not on strict contractual doctrine.

In articulating that the legislative history of the Act animates that the fundamental purpose of the OWBPA waiver provisions is to ensure that an older worker who is asked to sign an ADEA waiver does so in the absence of fraud, duress, coercion or mistake of material fact (contractual issues), the Fifth Circuit Court ignores the *totality of the*

circumstantial review standard. When Congress enacted the ADEA, it had in mind not only to provide benefits to victims of discrimination, but also to create incentives to companies to obey the law. To allow unrestricted and unlimited use of invalid waivers and to apply existing contract law to determine their enforceability will circumvent the intent of the law. Further, the Fifth Circuit's own dicta argues that such grounds to contest contractual performance, as delineated above, were already available to employees faced with an ADEA waiver prior to the enactment of the OWBPA. *Wamsley* at 537 n. 8.

To thus rule that non-compliance with the statute renders a waiver voidable and not void is in direct contradiction to the spirit and the language of the statute. Waivers which comply with OWBPA contain express provisions to insure employees have all the information and the time to consider that information. The OWBPA states that an individual "may not" waive any right or claim under ADEA unless the waiver is "knowing and voluntary". In *Oberg v. Allied Van Lines, Inc.*, the Court concluded that "[N]o matter how many times parties may try to ratify [a waiver] contract, the language of the OWBPA, '[a]n individual may not waive' forbids any waiver". 11 F. 3d at 682 (7th Cir. 1993).

Further, to arbitrarily circumvent those requirements articulated in the OWBPA and place an employee under duress to make decisions with regard to waiver of rights contradicts the spirit of the law, which is "to help employees and workers find ways of meeting problems arising from the impact of age in employment". The facts as presented in the case clearly show how an employer can circumvent the spirit of the law. The actions of EOI are in direct contradiction not only to the letter of the OWBPA but the intent of the law

to enable older workers and employees to find amicable means of resolving problems arising from an aging work force. 29 U.S.C. § 621 (b).

This rational was articulated by the Court in *Forbus v. Sears, Roebuck and Company, et al,* 958 F.2d 1036 (11th Cir. 1992) in which the Fifth Circuit's ruling in *Grillet v. Sears, Roebuck and Company,* 927 S.2d 217 (5th Cir. 1991) regarding ratification was rejected. 927 F.2d at 221. (Grillet addressed a pre-OWBPA decision in which the Fifth Circuit abandoned the totality circumstances approach with regard to determining "knowingly and voluntarily" and resorted to strict law of contract) The *Forbus* Court relied upon the Supreme Court's ruling in *Hogue v. Southern Rig Company,* 390 U.S. 516 (1968), which involved a suit under the Federal Employee's Liability Act, 45 U.S.C. § 51 et seq. ("FELA"), to rule that a tender back of consideration was not a prerequisite to bringing suit in an ADEA action. *See also, Constant v. Continental Telegraph Co.,* 745 F.Supp. 1374 (Co.I11 1990); *Isaacs v. Caterpillar, Inc.,* 765 F.Supp. 1359 (R.D.I11. 1991) (relying on *Hogue* to reject tender requirements in an ADEA case.) In *Forbus,* the Court found no basis for rejecting the Supreme Court's reasoning in *Hogue,* as the Fifth Court has, and for not applying it to ADEA claims as well as FELA claims. 958 F.2d 1036 at 1040.

As concisely stated by the Court, "[B]oth are remedial statues designed to protect employees". *Id.* at 1041. As articulated in *Isaacs,* public policy considerations support the determination that retirees, as in the *Forbus* case, or older workers, as in the case at bar, should not be required to tender back their retirement benefits [severance benefits] as a prerequisite to the maintenance of their lawsuit. 765 F.Supp. at

1366-68. In addressing this public policy issue, the *Forbus* court stated:

> "The Court in *Hogue* found that a tender requirement would deter meritorious challenges to releases in FELA lawsuits. The same deterrence factor applies to ADEA claims. Forcing older employees to tender back their severance benefits in order to attempt to regain their jobs would have a crippling effect on the ability of such employees to challenge releases obtained by misrepresentation or duress. *Such a rule would, in our opinion, encourage egregious behavior on the part of employers in forcing certain employees into early retirement for the economic benefit of the company.* The ADEA was specifically designed to prevent such conduct, and we reject a tender requirement as a prerequisite to instituting a challenge to a release in an ADEA case. As the Supreme Court decided in *Hogue,* unless the release otherwise bars recovery, the benefits paid "shall be deducted from any award determined to be due to the injured employee." 390 U.S. at 518, 88 S.Ct. at 1152. (emphasis added)

The interpretation currently held by the Fifth Circuit places an employee in a severely disadvantaged bargaining position in contrast to the employer-the specific concern raised time and again in the legislative history of the Act.

In *Wamsley,* the Fifth Circuit Court failed to take into considertion these public policy issues. In the case at bar, the funds Oubre, a single woman relying solely upon her own income, received (on a monthly basis, as opposed to a lump

sum) were used to pay living expenses. The petitioner is currently making one-half the salary she earned at EOI and it would be an extreme hardship to require the petitioner to tender back the funds received from EOI at this point in time. The facts of the case are an example of the "egregious behavior" cautioned by the *Forbus* Court if employers are allowed to so easily circumvent the law.

Given the totality of the circumstances, the review standard urged by the Seventh and the Eleventh Circuits it is clear that the failure of the petitioner to tender back severance funds should not ratify and make binding an otherwise invalid release, as urged by the Fifth Circuit, devised to ignore the requirements of the OWBPA.

CONCLUSION

Viewing all evidence in light most favorable to the petitioner, the applicable standard to be used in review of summary judgment, question of material fact exists with regard to whether the petitioner "knowingly and willingly" waived her rights to pursue a claim under the ADEA by executing a release upon separation of employment. The release prepared by EOI is invalid on its face because it does not meet the minimum statutory requirements of the OWBPA and a presumption of unknowing and unwillingness is created. Further, given the circumstances of the offer, the employer placed undue economical pressure upon the petitioner to accept the offer. Thus, a question is raised as to the petitioner's willingness to execute the release.

An additional material issue exists pertaining to whether Oubre received consideration for execution of the

release. The petitioner was given less material consideration than other employees who were required to sign a release and was given similar consideration to employees who were not required to sign a release. Within this issue remains a material question of fact as to the validity of the ranking program as an evaluation process or as subterfuge for a 10% reduction in work force.

In light of the foregoing, it is clear that the lower court departed from the accepted standard of review in granting summary judgment. Issues of material fact remain in dispute and this matter was not and is not ripe for final disposition by the court.

Further, and more significantly for purposes of this writ application, there exists a clear and distinct conflict between the Seventh and Eleventh Circuits on the one hand and Fifth Circuit on the other regarding interpretation of the affect of executed waivers which do not comply with the OWBPA and an older worker's rights in pursuing a claim under the ADEA. The petitioner, therefore, urges this Honorable Court to grant writ of certiorari to correct the error of the lower court and to resolve the conflict of law which exists in the circuit courts.

Respectfully submitted,

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CERTIFICATE OF SERVICE

This is to certify that a copy of this pleading has been forwarded to all counsel named below by placing same in the United States Mail, properly addressed and postage pre-paid on this 4th day of February, 1997.

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APPENDIX A

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF LOUISIANA

DOLORES M. OUBRE	CIVIL ACTION
VERSUS	NUMBER: 95-3168
ENTERGY OPERATIONS, INC., ET AL	SECTION: "C" 4

J U D G M E N T

Considering the Court having granted the motion by James P. Rooney and David Shipman to dismiss plaintiff's complaint and the motion by Entergy Operations, Inc. for summary judgment; accordingly,

IT IS ORDERED, ADJUDGED AND DECREED that there be judgment in favor of defendants Entergy Operations, Inc., Jim Rooney and Dave Shipman and against plaintiff Dolores M. Oubre, dismissing said plaintiff's complaint with prejudice, each party to bear its own costs.

New Orleans, Louisiana, this 28 day of May, 1996.

JUDGE GINGER BERRIGAN
UNITED STATES DISTRICT JUDGE

APPENDIX B

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF LOUISIANA

DOLORES M. OUBRE	CIVIL ACTION
VERSUS	NUMBER: 95-3168
ENTERGY OPERATIONS, INC., ET AL	SECTION: "C" 4

ORDER AND REASONS

This matter comes before the Court on motion for summary judgment filed by the defendant, Entergy Operations, Inc., ("Entergy"). Having considered the record, the memoranda of counsel and the law, the Court has determined that the summary judgment should be granted for the following reasons.

The undisputed facts reveal that the plaintiff, Dolores M. Oubre ("Oubre"), worked for the defendant, Entergy Operations, Inc. ("Entergy"), as a salaried employee at the Waterford Steam Electric Generating Station. In 1993, she received a poor work performance ranking from Entergy. All employees who received such rankings were offered the option of accepting a voluntary severance package and signing a release of claims or improving their performance by meeting the criteria of individually developed action plans. She was informed of her ranking and her options at a meeting with James Rooney ("Rooney") and David Shipman on January 17, 1995. She was given a letter containing the terms of the severance package and release and two weeks within which to make her decision.

On January 31, 1995, the plaintiff advised Rooney of her decision to accept the voluntary severance package and she signed the release. The release reads in relevant part as follows:

> I, Dolores M. Oubre, knowingly, voluntarily, and for valuable consideration agree to waive, settle, release and discharge any and all claims, demands, damages, actions, or causes of action occurring on or before the date of the execution of this Release, whether known or hereafter discovered, that I may have against Entergy Operations, Inc., its parent corporation, subsidiaries, affiliates, officers, directors, employees, agents, and legal representatives and their respective successors, heirs, and assigns ("the Company"), which in any way relate to my employment by or my separation from the Company.
>
> I acknowledge that I was provided with a copy of this Release, that I was advised to discuss this Release with my lawyer, and that I was given no less than 14 days within which to consider signing this Release. I have thoroughly reviewed this Release and understand that, to the extent I have any claims covered by this Release, I am waiving potentially valuable rights by signing below. My execution of this Release is free and voluntary and was not procured through duress, coercion, or undue influence.
>
> I UNDERSTAND, ACKNOWLEDGE, AND AGREE THAT BY SIGNING THIS

RELEASE, I AM OBTAINING ADDITIONAL MONIES AND BENEFITS FROM THE COMPANY IN THE FORM OF A VOLUNTARY SEVERANCE PACKAGE TO WHICH I WOULD NOT BE OTHERWISE ENTITLED. I UNDERSTAND, ACKNOWLEDGE, AND AGREE TO ALL THE TERMS OF THIS AGREEMENT.

The plaintiff has admitted in deposition that she understood the terms of the severance package, consulted with two attorneys about the offset of the release, received all monies under the severance package and has returned no money to Entergy.

Based on these undisputed facts, Entergy argues that the plaintiff has waived her right to bring this action because she signed the release and later ratified it by failing to return the benefits she received as a result of the severance. *Wamsley v. Champlin Refining & Chemicals, Inc.*, 11 F.3d 534 (5th Cir. 1993), *cert. denied*, 115 S.Ct. 1403 (1995). The plaintiff argues that the release did not comply with the requirements of the Age Discrimination in Employment Act ("ADEA")m 29 U.S.C. §621 *et seq*, and its 1990 amendment, the Older Workers Benefit Protection Act ("OWBPA"), 29 U.S.C. §626 (f) (A) - (H) and that the rationale adopted by the Fifth Circuit in *Wamsley* is erroneous.

The OWBPA provides that an individual cannot waive any right or claim under the ADEA unless the waiver is "knowing and voluntary" and provides that unless the waiver meets certain minimum criteria it may not be considered "knowing and voluntary". It is undisputed that the release

signed by the plaintiff did not meet some of these criteria, including the requirements that specific reference to ADEA rights be made, that a waiting period of at least 45 days within which to consider the agreement be given and that a seven day period following execution to revoke the agreement be provided. 29 U.S.C. §626(f) (1) (B), (F), (G).

The Fifth Circuit has specifically held however that the failure to meet the requirements of subsections (A) through (H) of the OWPA does not render the agreement void of legal effect even though not "knowing and voluntary". *Wamsley*, 11 F.3d at 539. Rather, such waivers are only subject to being avoided at the employee's option. According to *Wamsley*, where the employee chooses to retain and not tender back the benefits paid consideration for the agreement, she manifests an intention to be bound by the waiver and makes a new promise to abide by its terms. *Wamsley*, 11 F.3d at 540. *See also: Blakeney v. Lomas Information Systems, Inc.*, 65 F.3d 482 (5th Cir. 1995), *cert. denied*, 116 S.Ct. 1042 (1996).

The undisputed facts here fit squarely into the rule set forth in *Wamsley* and affirmed in *Blakeney*. This Court is not at liberty to disregard the law announced by the Fifth Circuit.

Accordingly,

IT IS ORDERED that the motion for summary judgment filed by the defendant, Entergy Operation, Inc., is hereby GRANTED.

New Orleans, Louisiana, this 23 day of May, 1996.

JUDGE GINGER BERRIGAN

UNITED STATES DISTRICT JUDGE

APPENDIX C

UNITED STSTES COURT OF APPEALS
For the Fifth Circuit

No. 96-30654
Summary Calender

DOLORES M. OUBRE,
Plaintiff-Appellant,

VERSUS

ENTERGY OPERATIONS, INC.,
Defendant-Appellee.

Appeal from the United States District Court
For the Eastern District of Louisiana
(95-CV-3168-C)

BEFORE GARWOOD, JOLLY, and DENNIS, Circuit Judges.

PER CURIAM:[1]

Dolores M. Oubre appeals from the district court's grant of summary judgment in favor of her employer, Entergy Operations, Inc., in her age discrimination action.

[1] Pursuant to Local Rule 47.5, the court has determined that this opinion should not be published and is not precedent except under the limited circumstances set forth in Local Rule 47.4.4.

We have reviewed the record and the parties' briefs and find no reversible error. Accordingly, the judgment is AFFIRMED for the reasons enunciated by the district court.

APPENDIX D

AGE DISCRIMINATION EMPLOYMENT ACT

SECTION 201. WAIVER OF RIGHTS OR CLAIMS

Section 7 of the Age Discrimination in Employment Act of 1967 (20 U.S.C. 626) is amended by adding at the end the following new subsection:

"(f) (1) An individual may not waive any right of claim under this Act unless the waiver is knowing and voluntary. Except as provided in paragraph (2), a waiver may not be considered knowing and voluntary unless at a minimum —

"(A) the waiver is part of an agreement between the individual and the employer that is written in a manner calculated to be understood by such individual, or by the average individual eligible to participate;

"(B) the waiver specifically refers to rights or claims arising under this Act;

"(C) the individual does not waive rights or claims that may arise after the date the waiver is executed;

"(D) the individual waives rights or claims only in exchange for consideration in addition to anything of value to which the individual already is entitled;

"(E) the individual is advised in writing to consult with an attorney prior to executing the agreement;

"(F) (i) the individual is given a period of at least 21 days within which to consider the agreement; or

(ii) if a waiver is requested in connection with an exit incentive or other employment termination program offered to a group or class of employees, the individual is given a period of at least 45 days within which to consider the agreement;

"(G) the agreement provides that for a period of at least 7 days following the execution of such agreement, the individual may revoke the agreement, and the agreement shall not become effective or enforceable until the revocation period had expired;

"(H) if a waiver is requested in connection with an exit incentive or other employment termination program offered to a group or class or employees, the employer (at the commencement of the period specified in subparagraph (F) informs the individual in writing in a manner calculated to be understood by the average individual eligible to participate, as to

(i) any class, unit, or group or individuals covered by such program, any eligibility factors for such program, and any time limits applicable to such program; and

(ii) the job titles and ages of all individuals eligible or selected for the program and the ages of all individuals in the same job classification or organizational unit who are not eligible or selected for the program.

"(2) A waiver in settlement of a charge filed with the Equal Employment Opportunity Commission, as an action filed in court by the individual or the individual's representative, alleging age discrimination of a kind prohibited under section 4 or 15 may not be considered knowing and voluntary unless at a minimum —

"(A) subparagraphs (A) through (E) of paragraph (1) have been met; and

"(B) the individual is given a reasonable period of time within which to consider the settlement agreement.

"(3) in any dispute that may arise over whether any of the requirements, conditions, and circumstances set forth in subparagraph (A), (B), (C). (D). (E), (F), (G) or (H) of paragraph (1), or subparagraph (A) or (B) of paragraph (2), have been met, the party asserting the validity of a waiver shall have the burden of proving in a court of competent jurisdiction that a waiver was knowing and voluntary pursuant to paragraph (1) or (2).

"(4) No waiver agreement may effect the Commission's rights and responsibilities to enforce this Act. No waiver may be used to justify interfering with the protected right of an employee to file a charge or participate in an investigation or proceeding conducted by the Commission."

* * *

SECTION 202 - EFFECTIVE DATE

(a) IN GENERAL - The amendment made by section 201 shall not apply with respect to waivers that occur before the date of enactment of this Act.

(b) RULE ON WAIVERS - Effective on the date of enactment of this Act, the rule on waivers issued by the Equal Employment Opportunity Commission and contained in section 1627. 16(c) of title 29, Code of Federal Regulations, shall have no force and effect.

* * *

TITLE III - SEVERABILITY

SECTION 301 - SEVERABILITY

If any provision of this act, or an amendment made by this act, or the application of such provision to any person or circumstances is held to be invalid, the remainder of this Act and the amendments made by this Act, and the application of such provision to other persons and circumstances, shall not be affected thereby.

APPENDIX E

Louisiana Civil Code Article 1966 - NO OBLIGATIONS WITHOUT CAUSE

An obligation cannot exist without a lawful cause.
Acts 1984, No. 331, § 1, eff. Jan. 1, 1985.

APPENDIX F

Louisiana Revised Statute 51:2231 - LOUISIANA HUMAN RIGHTS COMMISSION

§ 2231 Statement of purpose; limitation on prohibitions against discrimination because of age.

A. It is the purpose and intent of the legislature by this enactment to provide for execution within Louisiana of the policies embodied in the Federal Civil Rights Act of 1964, 1968, and 1972 and the Age Discrimination in Employment Act of 1967, as amended; and to assure that Louisiana has appropriate legislation prohibiting discrimination in employment and public accommodations sufficient to justify the deferral of cases by the Federal Equal Employment Opportunity Commission, the secretary of labor, and the Department of Justice under those statutes; top safeguard all individuals within the state from discrimination because of race, creed, color, religion, sex, age, disability, as defined in R.S. 51: 2232(11), or national origin in connection with employment, and in connection with public accommodations; to protect their interest in personal dignity and freedom from humiliation, to make available to the state their full productive capacities in employment; to secure the state against domestic strife and unrest which would menace its democratic institutions; to preserve the public safety, health, and general welfare; and to further the interest, rights, and privileges within the state.

B. The prohibitions in this Chapter against dis-

crimination because of age in connection with employment and in connection with public accomodations shall be limited to individuals who are at least forty years of age but less than seventy years of age.

* * *

§ 2242 Employment, discriminatory practices prohibited

A. It shall be a discriminatory practice for an employer:

(1) To fail, to refuse to hire, or to discharge any person or otherwise to discriminate against an individual with respect to compensation, terms, conditions, or privileges of employment because of the individual's race, creed, color, religion, sex, age, disability, as defined in R.S. 51: 2232(11), or national origin.

(2) To limit, segregate, or classify an employee or applicant for employment in any way which would deprive or tend to deprive an individual or employment opportunities or otherwise adversely affect the status of an employee, because of race, creed, color, religion, sex, age, disability, as defined in R.S. 51:2232(11), or national origin.

* * *

§ 2256 Conspiracy to violate this Chapter unlawful

It shall be an unlawful practice for a person or for two or more persons to conspire:

(1) To retaliate or discriminate in any manner against a person because he has opposed a practice declared unlawful by this Chapter, or because he has made a charge, filed a complaint, testified, assisted, or participated in any manner in any investigation, proceeding, or hearing under this Chapter.

(2) To aid, abet, incite, compel, or coerce a person to engage in any of the acts or practices declared unlawful by this Chapter.

(3) To obstruct or prevent a person from complying with the provisions of this Chapter or any order issued thereunder.

(4) To resist, prevent, impede, or interfere with the commission, or any of its members or representatives, in the lawful performance of duty under this Chapter.

APPENDIX G

Louisiana Revised Statute 23:971 - MISCELLANEOUS PROVISIONS

§ 972 Prohibitions of age discrimination; employer practices; exceptions

A. It is unlawful for an employer to:

(1) Fail or refuse to hire, or to discharge, any individual or otherwise discriminate against any individual with respect to his compensation, terms, conditions, or privileges of employment because of such individual's age.

(2) Limit, segregate, or classify his employees in any way which would deprive or tend to deprive any individual of employment opportunities or otherwise adversely affect his status as an employee because of such individual's age; or

(3) Reduce the wage rate of any employee in order to comply with this Part.

B. It is unlawful for an employment agency to fail or refuse to refer for employment, or otherwise to discriminate against, any individual because of such individual's age, or to classify or refer for employment any individual on the basis of such individual's age.

C. It is unlawful for a labor organization to:

(1) Exclude or expel from it membership, or otherwise discriminate against, any individual because of his age.

(2) Limit, segregate or classify its membership, or to classify or fail or refuse to refer for employment any individual, in any way, which would deprive or tend to deprive any individual of employment opportunities, or limit such employment opportunities or otherwise adversely affect his status as an employee or as an applicant for employment, solely because of such individual's age; or

(3) Cause or attempt to cause an employer to discriminate against an individual in violation of this Section.

D. It is unlawful for an employer to discriminate against any of his employees or applicants for employment, for an employment agency to discriminate against any individual, or for a labor organization to discriminate against any member thereof or applicant for membership, because such individual, member or applicant for membership has opposed any practice made unlawful by this Section, or becuase the individual member or applicant for membership has made a charge, testified, assisted, or participated in any manner in an investigation, proceeding, or litigation under this Part.

E. It is unlawful for an employer, labor organization, or employment agency to print or publish, or cause to be printed or published, any notice or advertisement relating to employment by such employer or membership in or any classification or referral for employment by such a labor organization, or relating to any classification or referral for employment by such employment agency indicating any preference limitation, specification, or discrimination based on age.

F. It is not unlawful for an employer, employment agency, or labor organization to :

(1) Take any action otherwise prohibited under Subsections A, B, C, or E, where age is a bona fide occupational qualification reasonably necessary to the normal operation of the particular business, or where the differentiation is based on reasonable factors other than age.

(2) Observe the terms of a bona fide seniority system or any bona fide employee benefit plan such as retirement, pension, or insurance plan, which is not a subterfuge to evade the purposes of this Part except that no such employee benefit plan shall excuse the failure to hire any individual; or

(3) Discharge or otherwise discipline an individual for good cause.

G. The prohibitions of this Part shall be limited to individuals who are at least forty years of age but less than seventy years of age.